INDEX

	Page
Opinon below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	10

CITATIONS

Case:

Spinelli v. *United States*, 393 U.S. 410 ---- 8

Statute:

21 U.S.C. 173 ---- 2

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1307

ELIZABETH BELLAMY, JAMES HUNTER, MARY MANN AND JAMES D. OREE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1971. The petition for a writ of certiorari was filed on February 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioners Hunter and Oree.

418-530—71

2. Whether petitioners were denied their right to move for suppression.

3. Whether the failure to try a government witness deprived petitioners of their right of cross-examination.

4. Whether the evidence supported petitioner Mann's conviction on the conspiracy count.

5. Whether the trial judge improperly suggested his belief in petitioner's guilt.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners (other than Mary Mann) were convicted of receiving and facilitating the transportation of approximately 390 grams of heroin in violation of 21 U.S.C. 173 and all petitioners were convicted of conspiracy to commit that offense. On April 30, 1970, Oree was sentenced to imprisonment for ten years, Hunter to seven years and the others to five. The court of appeals affirmed.

The evidence showed that in August of 1967, petitioner Oree contacted one Dennis Copeman and asked him if he would be interested in running a "mill" for the packaging of heroin (Tr. 18).[1] Copeman accepted the offer for an agreed salary of $350 per week, plus $150 for running the mill on each occasion of the packaging operation (Tr. 19). Ap-

[1] Dennis Copeman, a co-defendant in this case, testified as a government witness in respect to the details of the narcotics operation. His case was severed from that of other defendants on the government's motion (Tr. 14).

proximately four days after the conversation, Oree called Copeman and informed him that the mill would be in operation that evening at Apartment 3G, 1401 University Avenue, Bronx, New York (Tr. 20). At approximately 9:00 p.m. that evening, Copeman arrived at the apartment, where he met petitioners Mann and Bellamy and one Hopkins (Tr. 21). He saw approximately one-eighth of a kilogram of heroin as well as paraphernalia used for cutting and packaging. Copeman and the others conducted the packaging operation for approximately two and a half hours during which time no other persons either entered or departed from the apartment. Upon completion of packaging, Copeman gave Bellamy $150 and Mann $100. Copeman then left the apartment with the packaged heroin and distributed it to people on the street, delivering the proceeds of the distribution to Oree (Tr. 21–23).

Copeman conducted similar operations for Oree on three or four later occasions. Each time Oree telephoned the location of the operation to Copeman;[2] each time the narcotics and the necessary equipment for packaging were at hand; each time Bellamy and Mann were present; and each time the workers were paid after the packaging was completed. On the day of the arrests as well as on two prior occasions, petitioner Hunter was also present. Oree was at the mill only on the night of the arrests (Tr. 23–24).

[2] In all but one instance, when the operations were carried out at Copeman's residence, the location was the same (Tr. 23, 72).

On November 29, 1967, Oree instructed Copeman to go to Apartment 3G at 1401 University Avenue, to conduct another packaging operation (Tr. 24–25). At approximately 11:00 a.m. Copeman arrived at the apartment,[3] spoke briefly with Bellamy who informed him that "everything was ready," and then departed to take care of some personal business (Tr. 25–26).

At approximately 12:30 p.m. that day, Federal Bureau of Narcotics agents took up surveillance at 1401 University Avenue. A 1967 Oldsmobile bearing license No. XZ2717 was observed parked in front of 1401 University Avenue. At approximately 2:00 p.m. the agents observed Oree driving up to and entering the building with a plaid suitcase (Tr. 85–86, 177; see also affidavit of agent Coursey, *infra,* p. 7). One of the agents followed Oree into the building and saw him enter Apartment 3G (Tr. 144–145). Shortly thereafter, Oree left the building empty-handed and drove away (Tr. 86, 145–146).

Approximately ten minutes later, Mann, Hunter and one Sandra Meade, entered the building. At approximately 3:00 p.m. the agents observed two other women enter Apartment 3G (Tr. 87–88, 146–148, 176–177). One of the agents secured a search warrant for this apartment (Tr. 88–89) and returned to the surveillance area.

At about 5:30 p.m. Copeman returned. Bellamy produced the heroin from a plaid suitcase and processing began under Copeman's supervision. (Tr. 26-28).

---

[3] Copeman testified that by this time he had learned that the apartment belonged to Bellamy (Tr. 25–26).

The packaging was finished at approximately 7:00 p.m., when Copeman received a telephone call from Oree asking if the operation had been completed. When Copeman answered that it was, Oree said "Wait for me there." (Tr. 28–29). Oree arrived at about 8:00 p.m. and directed Copeman to give Hunter twenty-five bundles of the packaged heroin. Copeman complied, putting the bundles in a brown paper bag (Tr. 29). Hunter and Oree then left (Tr 30).

The agents arrested Oree and Hunter as they were leaving the building, seized the brown paper bag, and searched both petitioners. The bag held a number of glassine envelopes containing a white powder that proved to be heroin. The search of Hunter revealed a folded ten dollar bill containing a quantity of white powder. (Tr. 89–90, 149–150, 180–182, 195–198).

Four agents then entered the building and encountered Copeman, Barrs, and Wilson getting out of the elevator. They arrested them and seized from Copeman a plaid suitcase found to hold a large number of glassine envelopes containing a white powder that later proved to be heroin (Tr. 91–92, 151–152, 182–183, 195–198).

The agents proceeded to Apartment 3G, knocked on the door, identified themselves as Federal agents, and announced that they had a search warrant. Movement could be heard inside. When no one answered, the agents forcibly opened the door and proceeded to search the apartment and arrest all those present, including Bellamy and Mann (Tr. 92–93, 152–153).

ARGUMENT

1. The facts known to the officers at the time they arrested Oree and Hunter as they were leaving the building are set forth in the affidavit for the search warrant which the officers later executed. The significant portion of that affidavit by agent Coursey of the Bureau of Narcotics is as follows:

> Approximately one week ago your deponent received information from an informant whom he believes to be reliable concerning a "plant" where narcotics were being cut and packaged. The above mentioned informant stated that the informant had been in Apartment 3G of the premises 1401 University Avenue, Bronx, New York, on two prior occasions when narcotics were being cut and packaged. This informant who has been known to your deponent only a short period of time provided information concerning five or six narcotic violators, which information your deponent knows of his own knowledge to be accurate and reliable. The informant stated that the individuals who are in charge of this narcotics plant are known to the informant as "Pee [illegible]ee" and "J.D.". The informant stated that "Pee Wee" drives a 1967 Oldsmobile, license No. XZ2717. The informant further stated that the procedure that is followed with respect to this plant is that the narcotics are first delivered to the "plant" and the workers thereafter gather to cut and package the narcotics.
>
> On November 29, 1967, I received word from the informant that narcotics would be delivered to the "plant" and the workers would thereafter gather to cut and package the narcotics. Your deponent and other agents of the Federal Bu-

reau of Narcotics took up surveillance in the vicinity of 1401 University Avenue, Bronx, New York, at approximately 12:30 P.M. today. The 1967 Oldsmobile, license plate No. XZ2717 was observed parked in the vicinity of 1401 University Avenue, Bronx, New York. This particular car is registered to Beatrice Simmons, 856 East 228th Street, Bronx, New York. Beatrice Simmons is the wife of Hank Simmons. Hank Simmons is the subject of two narcotic cases in this district and in both cases cars were seized from Hank Simmons which were registered in the name of his wife Beatrice Simmons. At approximately 2:15 P.M., a 1968 Cadillac, license No. RR2356, was observed to park in the vicinity of 1401 University Avenue, Bronx, New York. An individual carrying a small suitcase was observed going into 1401 University Avenue, and was followed to the third floor. Shortly thereafter this same individual was observed exiting the premises 1401 University Avenue and at that time did not have the suitcase in his possession. The above described 1968 Cadillac is registered to J. D. Oree. A check of the files of the Federal Bureau of Narcotics reveals that J. D. Oree has a previous conviction for violation of the Federal Narcotic Laws. Thereafter, the above described informant was observed, along with other persons, entering 1401 University Avenue, Bronx, New York.

For the foregoing reasons your deponent has reason to believe that narcotics and paraphernalia used for the cutting and packaging of narcotics are now being kept and concealed in Apartment 3G of the premises 1401 University Avenue, Bronx, New York.

As the affidavit shows, through the informant's visits to the apartment he had personal knowledge of the information he related to the agent; this, in addition to the five or six prior occasions when the informant provided the agent with accurate information about narcotics violations, was more than sufficient not only to meet the test of reliability set forth in *Spinelli* v. *United States,* 393 U.S. 410, but also to lay the foundation for the arrests made after further observation. The agents' independent surveillance tended to confirm the veracity of the information that a heroin processing operation was in progress. By the time Oree and Hunter were seen leaving the building at 8:00 p.m., the agents knew Oree had entered the apartment with a suitcase but had left without it. The agents also had observed Hunter entering the building with two women in the afternoon. When the agents saw the two men, one carrying a brown paper bag, emerge together from the building, they had probable cause to believe that both men were involved in the processing operation and arrests were therefore proper.

2. The claim that the district court erred in denying a separate hearing on the issue of probable cause to arrest is fully answered in the opinion below. Since the sufficiency of the affidavit for the search warrant is clear and since the evidence at trial firmly established that there had been probable cause for the arrests, the trial judge properly declined to hold a separate hearing at the close of the government's case.

3. Petitioners contend that the government's failure to try Copeman deprived them of a substantial right of cross-examination. To the contrary Copeman was extensively cross-examined about whether his testimony was the result of an agreement to recommend clemency (Tr. 31–34, 44, 46–48, 59–60).

4. Petitioner Mann contends that the jury's failure to find her guilty on the substantive count shows that she was not in possession of the heroin and that therefore the evidence to support her conviction on the conspiracy count was insufficient. Copeman testified, however, that on each occasion of the packaging operation Mann was present and participated in the work of packaging heroin. That the jury chose to acquit her of the substantive count even though she did have possession of the heroin does not mean that it could not at the same time make the findings necessary to convict her of conspiracy.

5. Petitioners' contention that statements made during the instructions showed the judge's belief in petitioners' guilt is answered in the opinion below. In each instance the statements were preceded by cautionary statements such as "if you believe the evidence of Copeman and the agents * * *" (Tr. 278) and "Now as to Oree, if you accepted all the evidence submitted by the Government and draw from it the inferences which they suggest, you would be justified in concluding * * *" (Tr. 280). In response to Oree's objection to this instruction, the court said that it would further instruct the jury in order to dispel any

impression that the court believed the defendants were guilty (Tr. 293). In his supplemental instructions the judge stated "I made some reference to the defendant Oree as an entrepreneur or words to that effect. Here again, you are quite free to determine that Oree was not an entrepreneur, you are quite free to come to the conclusion that he should be acquitted. That is entirely up to you" (Tr. 308; see also Tr. 311).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attonrey General.
BEATRICE ROSENBERG,
Attorney.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971